Neutral Citation Number: [2009] EWHC 3470 (Admin)

CO/4443/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 23 February 2009

B e f o r e:

MR JUSTICE HICKINBOTTOM

Between:
THE QUEEN ON THE APPLICATION OF RAJANTHAN SIVAGNANAM
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Ms S Jegarajah (instructed by K Ravi Solicitors) appeared on behalf of the **Claimant**
Mr P Greatorex (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

Judgment
As Approved by the Court

1. MR JUSTICE HICKINBOTTOM: The claimant, Rajanthan Sivagnanam, is a Sri Lankan national who lived in Sri Lanka until 1998 when he was 21 years old. He arrived in the United Kingdom on 31 December 1998 when he claimed asylum on arrival based on his fear of persecution by both the LTTE and the Sri Lankan authorities. That claim was refused by letter of 12 April 2000. An appeal was refused by an adjudicator, and permission to appeal that determination was refused on 22 January 2001. In brief, the adjudicator found that the claimant had assisted the LTTE in his youth and had been arrested twice by the authorities - on the first occasion suffering mal-treatment amounting to torture - but by 1998 he was of no more interest to the authorities than any typical Tamil young man.

2. The claimant has been in the United Kingdom unlawfully since his appeal rights were exhausted in 2001. He is an intelligent and educated man. He has been aware both that his presence has been unlawful and that he has not been permitted to work, a matter he has recently confirmed (Statement 13 February 2009, at paragraph 14). Nevertheless, he has remained in the United Kingdom and begun to work, a matter to which I will return.

3. On 24 April 2006 solicitors on his behalf made representations on the basis that he had established a family and private life in the United Kingdom and his removal to Sri Lanka would disproportionately interfere with his rights under article 8 of the European Convention on Human Rights. Those representations were based primarily upon the length of his stay and his family life with his wife (whom he married in 2003 and who is a Sri Lankan national with leave to remain in the United Kingdom as a student), his child (born in 2004) and also with his siblings.

4. Those representations were refused by the Secretary of State on 16 June 2006, but they were properly regarded as a fresh claim: and a right of appeal was granted and exercised by the claimant.

5. In the appeal the claimant (again, if I might say so, properly) abandoned his claim based on family life, accepting that his wife and child could accompany him to Sri Lanka and also that he had no more than normal emotional ties with his siblings. The appeal was restricted to a claim based on his private life. The claimant's evidence was that he had completed an engineering degree since being in the United Kingdom: and had purchased a house with a mortgage and had a number of businesses, including management of a service station. He was, it was said, an employer and a tax payer.

6. On 28 August 2006 Immigration Judge Froom dismissed the appeal. He found that no house had been purchased, nor had the claimant managed a service station as he had suggested. In any event, particularly bearing in mind the claimant to his own knowledge should not have been working and the businesses were only set up in 2005, the Judge found that the claimant's removal would not amount to an interference with the exercise of his rights to a private life of such gravity as to engage article 8 at all.

7. That, the Judge said, was sufficient to dispose of the appeal (as it was): but he went on to balance the interference with those rights, such as they were, against the public

interest of maintaining and enforcing a fair scheme of immigration. Given his view that there was no significant interference with the article 8 rights, it comes as no surprise that in that balancing exercise he found as follows:

> "Overall I find the facts of this case are not truly exceptional so as to reach the required threshold to demand a departure from the rules. I find the appellant has chosen to remain her without leave and has developed his private life in the knowledge he had no serious expectation of being able to remain. The fact he has paid taxes and conducted himself correctly in other respects is not a matter to which much weight can be given. His long residence is not a factor leading to the case being regarded as exceptional. The Immigration Rules set the bar at 14 years for qualification for indefinite leave in the case of persons who have remained without leave. Article 8 does not confer a choice of country of residence. I dismiss the appeal on article 8 grounds."

8. The reference in that passage to true exceptionality reflects the law as it then stood as set out by the Court of Appeal in Huang [2005] EWCA Civ 105. I will return to that, but before I do I should briefly complete the history.

9. Notwithstanding the determination of the Immigration Judge, the claimant continued to reside in the United Kingdom and continued to work. On 23 May 2007 he was served with removal directions to Sri Lanka set for 30 May. By a letter of 26 May, solicitors on behalf of the claimant made further representations on the basis of his past treatment and deterioration of the situation in Sri Lanka; and article 8, this time being based upon both his private life (his two business, shops, and home in the United Kingdom), and family life with his wife and child. This claim for judicial review was then issued on 30 May, and the removal directions were consequently withdrawn. On 10 October 2007 the Secretary of State rejected the representations, considering them not to amount to a fresh claim.

10. The real issue in these proceedings has, therefore, moved to whether the May 2007 representations did or did not amount to a fresh claim.

11. On 9 November 2007, Silber J refused permission on the papers.

12. Following an oral reconsideration on 15 April 2008, Stadlen J gave permission on one restricted basis as follows:

> "Not without a great deal of misgiving and notwithstanding the arguments of [counsel for the defendant] regarding the immigration judge's application of Huang and Razgar, it does seem to me that it is arguable that there is a realistic prospect of a successful judicial review on the basis that the Secretary of State did not adequately approach the question of whether she, having applied the correct test and decided it made no difference to the outcome, when considering whether there was a realistic prospect of success it is arguable that the Secretary of State did not adequately address the question in the decision letter [of 10 October]. For

those reasons I give permission in this case."

13. The substantive hearing of the judicial review has been heard before me this morning. It has been restricted to that ground.

14. In my judgment, the ground is without merit for the following reasons.

15. First, in paragraph 20 of his determination the Immigration Judge found that article 8 was not engaged because there had been no interference with the claimant's exercise of his family or private life of sufficient gravity to engage article 8. That conclusion was understandable on the evidence before him: it was clearly a conclusion to which he could properly come on the evidence: it is a conclusion that is not challenged, and is unchallengeable. As the Immigration Judge said, it determined the appeal before – and without the need for - any exercise of balancing any interference with those rights with other public interests. The appeal failed at the stage of question 2 in the five questions set out by Lord Bingham in Razgar [2004] UKHL 27 at paragraph 17: "… "[W]ill such interference [by a public body with the exercise of the applicant's rights to respect for his private or… family life] have consequences of such gravity as potentially to engage the operation of article 8?" If the answer to that question is negative, then the applicant's claim under article 8 fails. The answer in the claimant's case was negative.

16. Second, in any event, the Immigration Judge conducted the balancing exercise. When he came to that exercise although he referred to "truly exceptional" on a couple of occasions (including in the passage I have quoted), looking at his determination as a whole, I have no doubt that he in fact did balance those respective rights and interests in a fair, modest and balanced way as required by Huang in the House of Lords ([2007] UKHL 11). When his determination is looked at as a whole it is clear that he did not treat exceptionality as a threshold requirement, which was the error of the Court of Appeal in Huang. The matter is one of substance and not form, as Sedley LJ observed in AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801 (at paragraphs 25 and 31).

17. Third, and again in any event, even if contrary to my view the Immigration Judge substantively applied the wrong test, I have no doubt that on any view of the facts in this case removal could not be disproportionate. Again, referring to Sedley LJ's judgment in AG (Eritrea) (at paragraph 37), he said:

> "What matters is not that courts and tribunals should adopt a set formula for determining proportionality, but that they should have proper and visible regard to relevant principles in making a structured decision about it case by case. It is not sufficient, as still happens, for the Tribunal simply to characterise something as proportionate or disproportionate: to do so may well be a failure of reasoning amounting to an error of law. But there will be many cases in which it can properly be said by an appellate tribunal that on no view of the facts could removal be disproportionate. In such cases ... even if the AIT has applied the wrong test, permission to appeal to this court is unlikely to be granted."

Those same comments apply to the exercise before me.

18. The claimant has, since arriving in the United Kingdom, graduated with a bachelor of engineering, bought and run three businesses employing six people, married and had a child, and he has four siblings living legally in the United Kingdom. Each of these has been used from time to time, in different combinations, to found an article 8 claim. However, the businesses were not set up until 2005. He has no ability lawfully to work. There is no evidence that his businesses cannot be maintained by others. He can sell them. He set them up in full knowledge of his lack of immigration status. His wife and child can go back to Sri Lanka with him. There is no more than the normal ties which his siblings. All of these matters, and the other matters raised by the claimant, were considered Immigration Judge Froom, in my view carefully and properly. In so far as he did err in law by applying the test of the Court of Appeal in Huang, in this case those matters patently and unarguably fail to overcome the legitimate public interest in maintaining a fair immigration scheme when balanced against them. In other words, any error of law by the Immigration Judge was not material.

19. Miss Jegarajay conceded, correctly, that to succeed in this application, she would have to undermine the determination of Immigration Judge Froom. For the reasons I have given, she has failed. In the letter of 10 October 2007 – the decision letter now effectively challenged - the Secretary of State clearly had Huang in the House of Lords in mind. She refers to it in paragraphs 9(j), 13 and 14 of that letter. That letter was, in my view, based appropriately upon the premise that the findings and conclusions of Immigration Judge Froom were correct. That letter clearly reflected the correct balancing requirement. The Secretary of State's approach was correct, as in my judgment was her view that the May representations put forward nothing to constitute a fresh claim.

20. For all of those reasons, I find that the Secretary of State's letter of 10 October properly considered the 26 May 2007 representations and properly considered that they did not constitute a fresh claim. The removal directions set for 30 May were, in my judgment, properly set. I dismiss this claim.

21. MR JUSTICE HICKINBOTTOM: Anything else?

22. MR GREATOREX: My Lord, just the issue the costs. I didn't have an opportunity to discuss it with my learned friend and we have not served a schedule, but I say as a matter of principle we are entitled to our costs, to be assessed if not agreed.

23. MR JUSTICE HICKINBOTTOM: Costs?

24. MIS JEGARAJAH: I can't resist that.

25. MR JUSTICE HICKINBOTTOM: Anything else?

26. MIS JEGARAJAH: No.

27. MR JUSTICE HICKINBOTTOM: Good. Thank you.